STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2010
v	No. 287916 Ingham Circuit Court
WILLIE DORIAL JONES, Defendant-Appellant.	LC No. 07-000938-FC

Before: FORT HOOD, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, armed robbery, MCL, 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 120 to 360 months for the conspiracy to commit armed robbery and armed robbery convictions, and a consecutive two years for the felony-firearm conviction. We vacate defendant's felony-firearm conviction and sentence but affirm his other convictions and sentences.

Defendant first argues that there was insufficient evidence adduced at trial to support his felony-firearm and conspiracy to commit armed robbery convictions. We agree, in part. "'In reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" *People v Fletcher*, 260 Mich App 531, 559; 679 NW2d 127 (2004), quoting *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). However, this Court should not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id.* at 561.

Defendant asserts that there was no evidence to support that he aided or abetted his codefendant, Aaron Diamond, in possessing the firearm during the robbery. We agree. The felony-firearm statute criminalizes the carrying or possessing of a firearm during the commission or attempted commission of a felony. MCL 750.227b(1). Under the aiding and abetting statute, MCL 767.30, a person who "counsels, aids, or abets" another in the commission of an offense may be tried and convicted as if he directly committed the offense. An aider and abettor must have "the same intent as the principle, or know that the principle possesses that intent." *People v King*, 210 Mich App 425, 430; 534 NW2d 534 (1995).

In *People v Moore*, 470 Mich 56, 70-71; 679 NW2d 41 (2004), our Supreme Court overruled its prior decision in *People v Johnson*, 411 Mich 50; 303 NW2d 442 (1981),[1] and articulated the proper standard for establishing a felony-firearm conviction under an aiding and abetting theory as follows:

> [T]he correct test for aiding and abetting felony-firearm in Michigan is whether the defendant "procures, counsels or abets in [another carrying or having possession of a firearm during the commission or attempted commission of a felony]."
>
> The prosecutor must do more than demonstrate that defendant aided the commission or attempted commission of the underlying crimes . . . . Rather, the prosecutors must demonstrate that defendant specifically aided the commission of felony-firearm. Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it has the effect of inducing the commission of the crime. It must be determined on a case-by-case basis whether the defendant "' performed acts or gave encouragement that assisted,'" in the carrying or possession of a firearm during the course of a felony. [*Moore*, 470 Mich at 70-71.]

However, "the fact that the defendant incidentally benefited from the principal's possession of the firearm" is not sufficient. *Id*. at 70 n 18. Rather, the prosecutor must show that the defendant either specifically encouraged the person possessing the gun to use it or aided and abetted the principal in obtaining or retaining the gun. *Id*. at 71.

Here, Diamond testified that defendant did not know that he was carrying a gun. While plaintiff refers this Court to the fact that defendant contacted Diamond and another man about a "lick," or easy robbery target, as sufficient evidence to support defendant's conviction, at best this evidence supports that defendant aided and abetted the robbery. It does not establish that defendant aided and abetted Diamond's possession of the gun during the robbery. And, again, the prosecution is required to do more than demonstrate defendant aided and abetted the underlying crime. *Moore*, 470 Mich at 70. Therefore, even when the evidence is viewed in the light most favorable to the prosecution, it was insufficient to support defendant's felony-firearm

[1] *Johnson* held that "[t]o convict one of aiding and abetting . . . [felony-firearm], it must be established that the defendant procured, counseled, aided, or abetted and so assisted in obtaining the proscribed possession, or in the retaining such possession otherwise obtained." *Johnson*, 411 Mich at 54.

conviction under an aiding and abetting theory. Accordingly, defendant's felony-firearm conviction and sentence are vacated.

Next, defendant argues that there was insufficient evidence to convict him of conspiracy to commit armed robbery because there was no evidence that defendant combined with Diamond to commit the robbery. We disagree. An armed robbery occurs if the following elements are met:

> (1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, or represented that he or she was in possession of dangerous weapon. [*People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007).]

"A conspiracy is an agreement, express or implied, between two or more persons to commit an unlawful or criminal act." *People v Barajas*, 198 Mich App 551, 553; 499 NW2d 396 (1993).

> The gist of the offense of conspiracy lies in the unlawful agreement between two or more persons. Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact.
>
> Furthermore, conspiracy may be established, and frequently is established by circumstantial evidence, and may be based on inference. [*People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974) (citations omitted), overruled on other grounds *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002)].

Because a conspiracy is complete upon formation of the agreement, no overt act in furtherance of the conspiracy is necessary to support the conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

Here, viewed in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for conspiracy to commit armed robbery. Again, there was testimony that defendant contacted Diamond and another man and told them that he had a "lick." While defendant refers this Court to Diamond's testimony that defendant had no prior knowledge of the gun, that testimony is irrelevant because he did not have to have prior knowledge of the gun. He conspired to commit armed robbery when he took advantage of the fact that Diamond had the gun to rob the victims.

Finally, defendant argues that the trial court abused its discretion in denying his motion for a new trial because the verdicts were against the great weight of the evidence. When determining if a verdict is against the great weight of the evidence this Court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled

in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The test is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Given that there was insufficient evidence to support defendant's felony-firearm conviction, the trial court did abuse its discretion in denying defendant's post-trial motion as to that conviction. However, because there was sufficient evidence to support defendant's conspiracy conviction, it did not abuse its discretion in that regard.

Defendant next argues that he was denied his right to a fair trial because of the prosecutor's misconduct in this case. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's conduct depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant argues that it was misconduct for the prosecutor to inject other-acts evidence into the trial. Defendant refers this Court to the following testimony by another codefendant, Dalton Moore, as inadmissible other bad acts evidence under MRE 404(b):

> *Q.* You've had contact with Willie Jones in the jail, correct?
>
> *A.* Yes, ma'am.
>
> *Q.* Where was that?
>
> *A.* It was in out cell blocks, when we first came in contact. I can't remember the floor I was on. They put us in the same cell block for about two weeks, probably.
>
> * * *
>
> *Q.* Did he ever say anything about paying the victims, to you?
>
> * * *
>
> *A.* Yeah. Paying him not to come to court.
>
> *Q.* Okay. Who said to that to him?
>
> *A.* Mr. Jones.
>
> * * *
>
> *Q.* Did he [defendant] ever threaten you, personally, about testifying?
>
> *A.* No. But he did assault me.

Q. Why did he assault you?

A. Because he found out he[2] was testifying.

Q. Were you injured?

A. Yes.

Q. What was it?

A. Five staples in my head.

Q. How were you assaulted?

A. When we got back to the county jail, they put me in the holding tank, and they put him in right behind me. He came in, hit me in the back of the head with a tray or something.

Evidence is not subject to analysis under MRE 404(b) merely because it suggests another bad act. Bad acts can be relevant as substantive evidence and admissible under MRE 401, without regard to MRE 404. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994); *People v Houston*, 261 Mich App 463, 468-469; 683 NW2d 192 (2004). In addition, the list of exceptions in MRE 404(b) is not exclusive. *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000).

MRE 404(b) states:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
>
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination.

[2] It appears that this is a typographical error.

The evidence that defendant assaulted Moore after he found out that Moore was testifying against him was used for the proper purpose of demonstrating consciousness of guilt. It is well established that "evidence of a defendant's subsequent efforts to influence or coerce a witness against him is admissible where such activity demonstrates a consciousness of guilt on the part of the defendant." *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981). And a party may introduce other-acts evidence for any legitimate reason unrelated to character. *People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990). Therefore, because the evidence was introduced for a proper purpose, defendant's prosecutorial misconduct argument must fail.

Defendant further argues that the trial court erred in failing to suppress the victims' in-court identifications of defendant because they were tainted by the two separate one-on-one confrontations the victims had with defendant before trial. Again, we disagree. A trial court's decision regarding identification evidence will not be reversed unless it is clearly erroneous. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process of law. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), citing *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). To sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). Further, the fact that the pretrial confrontation occurred at a prior court proceeding does not mean that it cannot be considered unduly suggestive. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). But this Court has repeatedly held that not all pretrial confrontations are impermissibly suggestive. See, e.g., *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984).

Additionally, just because the identification procedure is suggestive does not mean that it is constitutionally defective. *Kurylczyk*, 443 Mich at 306. The test is whether the procedures were so impermissibly suggestive in light of the totality of the circumstances that they led to a substantial likelihood of misidentification. *Id*. at 302. Here, the initial identification by the victims made immediately following the robbery was not suggestive. This Court has upheld prompt on-the-scene identifications when there were no suggestions by law enforcement at the identification. See, e.g., *People v Libbett*, 251 Mich App 353, 358; 650 NW2d 407 (2002); *People v Purofoy*, 116 Mich App 471; 322 NW2d 446 (1982); *People v Johnson*, 59 Mich App 187, 190; 229 NW2d 372 (1975). And, in this case, there was no suggestion of guilt made by the officers. Rather, the victims saw defendant exit an apartment building and pointed him out to the police.

The second identification was made at a parole hearing, which the trial court likened to a preliminary examination. Again, this Court has repeatedly held that not all pretrial confrontations are impermissibly suggestive. *Hampton*, 138 Mich App at 238. Rather, the relevant factors to be considered include "the opportunity for the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation." *Colon*, 233 Mich App at 304-305.

In this case, the victims were able to view defendant both before and after the robbery. While their attention may have been decreased during the robbery, the victims had spent time with defendant before the robbery (even riding in the same vehicle as him) when they were not under any duress. There is no record evidence regarding the accuracy of a prior description or the victims' level of certainty at the parole hearing. However, only a month had lapsed between the time of the robbery and the hearing date. Accordingly, the factors weigh in favor of a proper pretrial identification. But even if the pretrial identifications were impermissibly suggestive, there was a sufficient independent basis for the in-court identifications. *Id.* at 304.

Finally, we reject defendant's ineffective assistance of counsel claim. To establish a claim of ineffective assistance of counsel, defendant bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that defendant was denied a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). To meet the second part of the test, defendant must show that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id*. at 6.

Defendant first argues that defense counsel was ineffective in failing to object to the admission of allegedly improper other acts evidence. However, as discussed *supra*, the evidence was admitted for a proper purpose. Therefore, any objection by counsel to the admission of the evidence would have been futile, and counsel cannot be faulted for failing to make a futile or meritless objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant also argues that defense counsel was ineffective when he failed to impeach a witness with his inconsistent testimony. But cross-examination is a matter of trial strategy that this Court will not second-guess. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Further, the inconsistency was already before the jury through the victim's testimony and defense counsel pointed out the inconsistency during closing argument. Therefore, defendant cannot establish that counsel's decision to not impeach the witness affected the outcome of the trial.

We vacate defendant's felony-firearm conviction and sentence but affirm his other convictions and sentences. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens